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Supreme Court of the United States

October Term, 1974

No. 74-845

CHIM MING,

Petitioner,

vs.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Respondents.

LAM YIM YIM, et al.,

Petitioners,

vs.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JULES E. COVEN
LEBENKOFF & COVEN
Attorneys for Petitioners
1 East 42nd Street
New York, New York 10017
(212) 687-3541

ABRAHAM LEBENKOFF
MARTIN R. GREENBERG
On the Brief

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In The

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CHIM MING,

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LAM YIM YIM, et al.,

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vs.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Are aliens who are refugees, presently in the United States, eligible for the benefits of the United Nations Protocol relating to the status of refugees and entered into force with respect to the United States on November 1, 1968, notwithstanding the fact that they have violated their immigration status in the United States?

2. What is the meaning of the term "lawful" as it appears in Article 32 of the Protocol?

3. Did the Government abuse its discretion by raising an argument contrary to its consistent administrative policy when it considered the manner of entry and the status of the petitioners in the United States when the Government denied their applications for refugee status?

4. Should this matter be referred back to the Immigration Service in view of the changed regulations with reference to the Immigration Judge (Special Inquiry Officer) now having the authority to rule upon applications for asylum, pursuant to the Protocol at the deportation hearing?

TREATY AND POLICY STATEMENT INVOLVED

PROTOCOL RELATING TO THE STATUS OF REFUGEES

ARTICLE 1 of the TREATY

Definition of the Term "Refugee"

A. (1) . . . and (2) . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

ARTICLE 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

POLICY STATEMENT

Department of State

January 4, 1972

General Policy for Dealing With Requests for Asylum by Foreign Nationals

Policy

Both within the United States and abroad, foreign nationals who request asylum of the United States Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by United States personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

In such cases of such requests occurring within foreign jurisdiction, the ability of the United States Government to give assistance will vary with location and circumstances of the request.

United States Objectives

A basic objective of the United States is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

Background

A primary consideration in United States asylum policy is the Protocol Relating to the Status of Refugees, to which the United States is a party. The principles of asylum inherent in this international treaty (and in the 1951 Refugee Convention whose substantive provisions are by reference incorporated in the Protocol) and its explicit prohibition against the forcible return of refugees to conditions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

United States participation in assistance programs for the relief of refugees outside the United States jurisdiction and for their permanent resettlement in asylum or other countries helps resolve existing refugee problems. It also avoids extensive accumulation of refugees in asylum countries and promotes the willingness of the latter to maintain policies of asylum for other arriving refugees.

President Nixon has reemphasized the United States commitment to the provision of asylum for refugees and directed appropriate Departments and Agencies of the United States Goverment, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.

STATEMENT

The petitioners are all natives and citizens of the Mainland of China. The Mainland of China is presently under the control of the People's Republic of China, a Communist government. The petitioners all allege and contend that they fled from China owing to a well-founded fear of being persecuted for reasons of their political opinions and they are unable and unwilling to return to their homeland owing to such fear.

After they entered the United States, the petitioners were accorded hearings in deportation and found to be deportable as charged.

Chim Ming made no application for relief in 1968 when he had his hearing. Lam Yim Yim was granted the privilege of voluntary departure.

Chim Ming was called upon to surrender for deportation in November, 1972. At that time he submitted an application for a stay of deportation, coupled with an application for political asylum or temporary refuge in the United States, pursuant to the

provisions of the Policy Statement of the Secretary of State of January 4, 1972 (formally published as Public Notice 351 in the Federal Register of February 16, 1972, 37 F. R. 3447). At that time, the alien was granted a temporary stay of deportation pending consultation by the Immigration Service with the State Department to determine the validity of his application as refugee. At no time was his status in the United States questioned since everyone concerned knew that he was a deportable alien and, in fact, the Immigration Service and the State Department were routinely accepting applications and acting upon them on the merits of the aliens' claims for refugee status without regard to the immigration status of the petitioners in the United States. The question of legal or illegal status in the United States was, apparently, a factor that was not germane to the requests.

In his application for asylum and temporary refuge, the petitioner herein stated he had fled from China because of the Communist control of that country and that he had never established permanent residence in any country other than the Mainland of China.

Thereafter, on January 16, 1973, Chim Ming was advised by the Immigration Service that after consultation with the Department of State it had determined that there "is no basis for granting your request for political asylum." This statement was based upon a letter from the Department of State which stated that Mr. Chim had not made a valid case to remain in this country as a political refugee, indicating that his application was acted upon and considered on the merits.

The petitioner, Lam Yim Yim's case was treated somewhat differently.

Lam Yim Yim received a notice to surrender for deportation on April 2, 1973. At that time, Lam Yim Yim, submitted a similar application as that made by petitioner, Chim Ming, to the Immigration Service in New York. At the time of the submission of the application, he was advised that his application would not be forwarded to the State Department, but that a decision would be made by the Immigration Service in New York and that his application for a stay of deportation would not be granted. The instant action on behalf of Lam Yim Yim was commenced at that time and Mr. Lam's deportation was stayed administratively pending final determination of the instant litigation.

The basis for the Policy Statement of January 4, 1972 is the International Treaty entered into by the United States on November 1, 1968, to wit, the Protocol relating to the status of refugees. It is the contention of the petitioners that they are refugees as defined in Article 1(A)(2) of the Protocol, in that, owing to a well-founded fear of being persecuted, they are outside the country of their nationality and are unable and unwilling to return to it and therefore, being refugees, are entitled to the benefits accorded them in the Protocol. In fact, Judge Carter, in his opinion in this matter assumed that the petitioners were refugees for the purposes of his decision. Article 32 states that a refugee shall not be expelled except on grounds of national security or public order. In view of the fact that the petitioners fall directly under the definition of "refugee" as stated in the Treaty, and, in view of the fact that the Government is

attempting to deport them, the instant action was commenced to declare the acts of the Immigration Service illegal and in violation of the Treaty.

The instant case was then heard by Judge Carter of the United States District Court, and Judge Carter ruled that since the petitioners were unlawfully in the United States, they were ineligible to apply for the benefits of the Treaty and he, therefore, granted summary judgment in favor of the Government and dismissed the complaint.

The decision was affirmed by the United States Court of Appeals for the Second Circuit on November 8, 1974.

REASONS FOR GRANTING THE WRIT

The decision below raises a number of important questions with reference to the interpretation of an International Treaty relating to refugees which was entered into by the United States in 1968.

Although there are only three petitioners involved in the instant litigation, there are a few hundred cases in the United States District Court awaiting action of this Court, and those cases will be bound by the final determination of this action.

The basis of the petitioners' action is the Treaty signed by the then President of the United States upon the consent of the Senate and made effective November 1, 1968. This Treaty was mentioned by this Court in the case of *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62 (1969). However,

the Court in that case did not specifically consider the question raised in the case at bar, but the Supreme Court did remand the *Stanisic* matter back for other purposes, with the following statement:

> ". . .Likewise, it is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968."

It is the belief of the writer that the time and the situation now make it necessary for the Supreme Court to rule on the implications and meanings of the Protocol Relating to the Status of Refugees.

The decision of the Court below found that the aliens could not apply for the benefits of the Treaty because they were not aliens lawfully in the United States. This decision severely limits the operation of this Treaty in view of the fact that many sections of the Treaty would, therefore, be unavailable to refugee aliens in the United States.

In the case at bar, the petitioners claim to be refugees. The facts are not in dispute. They left Red China because of the Communist government. They are unwilling to return to the country of their nationality because of the Communist government in that country. The definition of "refugee" as set forth in Article 1(A)(2) in the Treaty, is as follows:

> ". . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it."

The Immigration Service, in the notices of denial sent to the petitioners herein made no mention of the fact that the alien's lawful or unlawful status in the United States was being considered. They indicated that the denial of the applications was made on the basis that the petitioners were not refugees. This is in direct contradiction to the position taken by the Government in the courts, and in direct contradiction of the decisions made by the District Court and by the United States Court of Appeals. The reasons given for denying the petitioners' action in the courts was the unlawful status of the petitioners in the United States.

This decision was different from the decision rendered by the Immigration Service. Copies of the denials entered by the Immigration Service are included in the appendix to this petitioner.

The courts below restricted the operation and effectiveness of the Treaty. It basically excluded most aliens in the United

States from receiving any benefits of the Treaty. The petitioners are being denied relief because they did not file their applications prior to the expiration of their initial admission time in the United States, a bar to relief which was raised for the first time by the Government in the District Court.

The decision of the courts below, finding that the petitioners were ineligible for relief, is in error for the following reasons: the first and possibly the most important reason is that the appellees, Immigration Service and Department of State, had always interpreted the Treaty in a different fashion. The cases at bar were considered by the State Department and by the Immigration Service upon the merits of the aliens' claim for refugee status. The Immigration Service and the Secretary of State had never considered the immigration status of an asylum seeker when considering the asylum application. In fact, the decisions in these cases by the Secretary of State show conclusively that they were considered on the merits and were not found to be statutorily ineligible.

Before these actions were commenced, the meaning of the word "lawful" as stated in Article 32 of the Treaty had not yet been defined. The Government now urges a strict interpretation claiming that the word "lawful" is synonymous with being in the United States in a legal status under our Immigration Laws. It is urged by the writer that it is not synonymous with the deportation sections of the United States Immigration Laws. There are numerous situations where a person can be lawfully in the United States in a non-technical sense and still be under an Order of Deportation. It is not unusual for an alien, after conceding deportability, to be granted the privilege of voluntary

departure (as was done in the Lam case) and be allowed to remain in the United States for an indefinite period of time, even though he is under an Order finding him to be deportable from the United States. Such a person would be in the United States lawfully, that is, with the permission of the Immigration and Naturalization Service.

Another situation common to the United States Immigration Laws is that a person who violates his status but the Immigration Service for some reason or other not wishing to deport him, grants the alien an indefinite stay of deportation either before or after a hearing before an Immigration Judge. Such a person would be allowed to remain in the territory of the United States, although deportable, and yet, it could not be alleged that he is here unlawfully or without the permission of the authorities.

Another example, which could be more closely associated with the cases at bar, would be that of an alien who at his deportation hearing conceded his deportability and asked that his deportation be stayed pursuant to Section 243(h) of the Immigration and Nationality Act. If the application is granted, the decision is that the alien is deportable, but he shall be granted a temporary stay of deportation. Such an alien certainly is illegally in the United States, however, he is here with the permission of the authorities and is allowed to remain with the permission of the authorities. Such a person is lawfully in the territory of the United States.

If the word "lawful" is to be interpreted as the lower Court ruled, it would, in fact, make the Treaty a nullity since ordinarily

the only persons who would apply for the benefits of the Treaty would, by necessity, be in the United States in violation of the Immigration Laws. If this is so, we can see that the definition of the word "lawfully" must mean less than the finding that a person is a non-deportable alien. For example, if a person enters as a crewman and applies for refugee status prior to the expiration of the 29 days he is permitted to remain in the United States it would, at that very moment, make him a deportable alien under the Immigration Laws of the United States since he would be violating the condition of his admission and, therefore, "unlawfully in the United States pursuant to the Immigration Laws." (See Section 252(b) of the Immigration and Nationality Act, as amended.)

This is exactly the situation that arose in the *Stanisic* case.

To make the Treaty more operable there must be a liberal construction of the words "lawfully in their territory."

The former Secretary of State, Dean Rusk, in his Letter of Submittal transmitted to the then President of the United States, dated July 25, 1968 stated:

> "As refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health or economic dependence."

From this quotation, we can see that a refugee should not be deported on mere technical grounds if he is once found to be

a refugee. The decision arrived at by the District Director and upheld by the courts below is, indeed, a harsh one. It, basically, would eliminate just about all the refugees in the United States from seeking relief under Article 32 of the Treaty. The main thrust of the Protocol is the humane treatment of refugees. The Treaty was not entered into by the United States as a mere useless gesture, but as a viable document, as stated in the General Policy Statement of the Department of State of January 4, 1972 (to wit):

> "President Nixon has reemphasized the United States commitment to the provison of asylum for refugees and directed appropriate Departments and Agencies of the United States Government, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment."

The interpretation urged by the petitioners herein is further substantiated by the recent enactment of 8 C.F.R. 223a.3, which states:

> "*223a.3 ELIGIBILITY*
>
> Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose

> presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued, in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require . . . ."

From this regulation it appears obvious that all refugees in the United States may obtain travel documents which would permit such refugees to reenter the United States. The regulations, obviously recognize that a person who is illegally or unlawfully in the United States could still gain the benefits of the Protocol when they make the statement, "any other refugee."

In further support of the position of the appellants that the "lawful" question was an afterthought raised after the institution of the litigation by the appellants, the Court's attention is directed to the "Operations Instructions" issued on July 26, 1972, namely, "Operations Instructions, 108.1(f)." These directions are the procedures that are to be followed by the Immigration Service when requests for asylum are made by alleged refugees. It states:

> "108.1(f) — ALIENS WITHIN THE UNITED STATES. (1) ASYLUM REQUEST PRIOR TO DEPORTATION HEARING. Any alien within the United States who requests asylum, including a crewman or stowaway, shall be interviewed as set forth in 01 108.1(a)."

It is obvious that the "stowaway" they speak about must be one who is in the United States in violation of the Immigration Laws. However, it is also obvious that such a person is entitled to have his application for asylum ruled upon the merits. Thus we can see that here, again, the Immigration Service and the State Department have indicated that their intention is to read the Treaty the way the aliens claim it should be read. (Incidentally, the way it has been read where other aliens have been involved.)

Further support for the position of the petitioners is found in the operating instructions, 108.1f(3):

> "(3) *Asylum request after completion of deportation hearing.* In any case in which an alien requests asylum after completion of a deportation hearing, the district director shall fully consider the bona fides of the request. If the district director determines that asylum should be granted, the alien should be granted extension of voluntary departure or stay of deportation in increments of a year with permission to work. Each such case shall be reviewed annually to determine if the need for asylum continues to exist and if any administrative remedy may be available to the subject.
>
> On the other hand, if it appears after preliminary interview that there is clearly no basis for the alien's contention that he will be persecuted if he returns to his home country, he shall be so

informed. In any such case in which the alien does not withdraw his request for asylum he shall then be interviewed in depth and the district director shall furnish full particulars of the case to the Office of Refugee and Migration Affairs, by letter. No further action shall be taken until the views of that office have been received and considered by the district director. If the district director then finds adversely in the case and the alien does not withdraw his request for asylum, he shall be advised that he may, if he so desires, request reopening of his hearing before a special inquiry officer for the purpose of introducing an application to withhold deportation under section 243(h) of the Act.

(g) *Definition of 'home country.'* The term 'home country,' as used in this OI, means the country of birth or nationality or country in which firmly resettled."

From these operating instructions, we can see that a refugee is permitted and allowed to submit his application for asylum after he has been found deportable. These operating instructions are the official directions of the Immigration Officers as to how they shall operate, and it is the position of the petitioner that the Immigration Service is bound by their internal operating instructions.

It is also interesting to note that nowhere in the Immigration Service's decision did they find that the petitioners

have become firmly resettled in a third country, as required by the operating instructions.

It is the position of the petitioners that the Government, by now raising an argument contrary to its consistent administrative policy, makes the decision one that is arbitrary and capricious. By this, the petitioners mean that the Immigration Service and the State Department were and are accepting and ruling upon the merits of the applications submitted by persons claiming to be refugees without regard to the manner of entry or the status of the aliens in the United States. Their practice and procedure was and is to consider the applications of persons claiming to be refugees without regard to the immigration status of the aliens involved.

As the United States Court of Appeals for the Second Circuit has stated, discretion would be abused, to wit: *Hang v. Ins*, 360 F.2d 715, 719 (2nd Circuit 1961):

> "If it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group."

If the decision below is not changed, then the effectiveness of the Treaty will be severely limited, if not totally nullified. If only refugees who are lawfully in the United States can apply, what purpose would the Treaty have? The person lawfully in the United States would not have to apply.

In addition to the above reasons for the writ to be granted, the writer wishes to call the Court's attention to the following change in regulations which took effect in July, 1974, which is after the decision of the District Court.

The regulations now state that the Immigration Judge (formerly, Special Inquiry Officer) has the authority to rule upon applications for relief, pursuant to the United Nations Treaty, and more particularly, Articles 32 and 33 of the Treaty. The regulation reads as follows:

> "*8 C.F.R. 242.8 Special Inquiry Officers (a) Authority.*
>
> In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section 242(b) of the Act; to consider claims for relief from deportation under Articles 32 and 33 of the Convention Relating to the Status of Refugees, as amended by the Protocol Relating to the Status of Refugees . . . ."

At the time that the petitioners herein were afforded deportation hearings, these regulations were not in effect, and therefore, the aliens could not have asked the Immigration Judge for relief prior to a finding that they were deportable from the United States. It might be that had they been allowed to make such an application at the time of the original hearing, they would not be in an unlawful status in the United States,

and therefore, would be eligible for the relief pursuant to the Treaty especially since they have been assumed to be refugees in the instant litigation.

The decision of the courts below clamps a lid on a humanitarian document, as well as creating an unworkable situation. The interpretation urged by the petitioners does not create any new class of aliens or quota numbers under our present immigration system. The aliens granted relief under the Protocol would not be permanent residents and our quota limit would not be violated. The only relief that would be granted would be limited in nature and scope. The aliens would merely be granted temporary stays of deportation which would be subject to review annually. If the world situation changes, the aliens would be forced to leave. There would not be an increase in the number of aliens admitted to the United States under our quota system. Justice demands that the Treaty be liberally construed.

CONCLUSION

WHEREFORE, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Jules E. Coven
LEBENKOFF & COVEN
Attorneys for Petitioners

ABRAHAM LEBENKOFF
MARTIN R. GREENBERG
On the Brief

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 43, 75—September Term, 1974.

(Argued September 23, 1974 Decided November 8, 1974.)

Docket Nos. 74-1280, 74-1281

CHIM MING,

Appellant,

v.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and William P. Rogers, as Secretary of State of the United States of America,

Appellees.

LAM YIM YIM, et al.,

Appellants,

v.

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Appellee.

Before:

LUMBARD, FEINBERG and OAKES,

Circuit Judges.

Appeal by Chinese seamen from the granting of the Government's motion for summary judgment and denial of plaintiffs' preliminary injunction to enjoin deportation to Hong Kong on the grounds that they are refugees and entitled to protection of Article 32 of the Convention Relating

to the Status of Refugees. Held, plaintiffs are unlawfully in this country and thus, regardless of refugee status, do not come within the provisions of Article 32.

Judgment affirmed.

JULES E. COVEN, New York, New York, *for Appellants.*

JOSEPH P. MARRO, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; Gerald A. Rosenberg, Assistant United States Attorney, of counsel), *for Appellees.*

PER CURIAM:

These consolidated appeals raise essentially the same question: whether appellants, assumed *arguendo* to be refugees within Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees (the Convention),[1] are entitled to protection by virtue of Article 32. Article 32 of the Convention provides that:

> *Expulsion*
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Appellants are citizens of the People's Republic of China who had left Mainland China for Hong Kong several years

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1 19 U.S.T. 6259, T.I.A.S. No. 6577. The Convention was made applicable to the United States by virtue of the United Nations Protocol Relating to the Status of Refugees (the Protocol), 19 U.S.T. 6223, T.I.A.S. No. 6577, advised by the United States Senate on October 4, 1968, approved by the President of the United States on October 15, 1968, effective November 1, 1968. Under Article 1 of the Protocol, except with respect to certain technical changes, the states parties to the Protocol undertook "to apply articles 2 to 34 inclusive of the Convention . . . ."

before coming to the United States. Both are seamen, having Hong Kong seaman's documents, and were permitted to enter this country only as nonimmigrant crewmen. As such they were authorized to remain in the United States only for a period not to exceed 29 days under § 252 of the Immigration and Nationality Act, 8 U.S.C. § 1282. Both appellants deserted their ships in the United States and overstayed the 29-day period. Both were apprehended by officers of the Immigration and Naturalization Service, given deportation hearings and were found to be deportable to Hong Kong. Neither appealed the finding. Both remain in the United States.

The United States District Court for the Southern District of New York, Robert L. Carter, Judge, held that appellants were not "lawfully" in the United States under the clear meaning of Article 32 of the Convention, supported by the history of the treaty, its legislative history in the Senate, court rulings and the plain language of the words in question. Thus Article 32 affords no protection to the appellants, even if they are refugees. We agree with Judge Carter, whose careful opinion below, *Chim Ming* v. *Marks*, 367 F. Supp. 673 (S.D.N.Y. 1973), we rely upon and adopt. His opinion in turn finds support in and relies upon *Kan Kam Lin* v. *Rinaldi*, 361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir. 1974) (per curiam), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. May 15, 1974) (No. 73-1710).

Denying the applicability of Article 32 in these cases is also supported by Article 31[2] of the Convention, relating to refugees unlawfully in the country of refuge, which characterizes such refugees as those persons who

---

2 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their ter-

"enter or are present in their territory without authorization." Under Article 31 it is possible that the status of a refugee who has entered illegally the territory of a contracting state may subsequently be regularized. Conversely, the stay of a refugee who has entered in a regular manner may subsequently become unlawful as here, where appellants were admitted for a limited period only. Thus, the only rational interpretation that can be placed upon the term 'lawfully in their territory" in Article 32 is one consistent with the definition of unlawfulness in Article 31 as involving the status of being in a nation "without authorization." Since a nation's immigration laws provide authorization, one unlawfully in the country is in violation of those laws.

We need only add that Judge Carter's interpretation of Article 32 by no means makes the treaty a nullity and without benefit to refugees. There is protection under Subsection 2 of Article 31 insofar as it provides that "Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country." Under Paragraph 1 of Article 33 of the Convention, moreover, there need be no concern that the United States would return a refugee unlawfully here to a country where the refugee would be persecuted.[3] This savings clause, so to speak, is further

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ritory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

3 1. No Contracting States shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories

supported by the express terms of § 243(h) of the Act, 8 U.S.C. § 1253(h).[4] Section 243(h) provides

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

That an alien may be barred from seeking protection under Article 32 by virtue of his being unlawfully in this country does not prevent him from obtaining relief under available provisions of our immigration laws, including not only § 243(h), but also § 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7), referring to conditional entries.[5]

Judgment affirmed.

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where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

4 The Service proposes to return appellants to Hong Kong, and neither claims that he will be persecuted there.

5 Section 203(a)(7), 8 U.S.C. § 1153(a)(7) provides:

> (a) Aliens who are subject to the numerical limitations specified in Section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> . . . .
>
> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in Section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area, on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; . . . .

OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIM MING,

Plaintiff,

-against-

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants.

Index No. 73 Civ. 545

LAM YIM YIM, et al.,

Plaintiffs,

-against-

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant.

Index No. 73 Civ. 1342

Opinion of the United States District Court

Memorandum Opinion

The plaintiffs in these two cases have petitioned the court for a preliminary injunction staying deportation orders now pending against them and the Government has cross-moved for summary judgment. The Plaintiffs,[1] Chinese aliens arriving in this country as seamen on ships out of Hong Kong, seek asylum here as refugees under the provisions of the United Nations Protocol Relating to the Status of Refugees (hereinafter "the Protocol"), 19 U.S.T. 6223, T.I.A.S. No. 6577, and the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter "the Convention"), 19 U.S.T. 6259, T.I.A.S. No. 6577.

The jurisdiction of this court is invoked pursuant to 5 U.S.C. §§702-706, 8 U.S.C. §1329 and 28 U.S.C. §2201, *et seq.* The Government does not contest jurisdiction. In an action similar to this, *Kan Kam Lin v. Rinaldi,* Civ. Action No. 1823-72 (D.N.J. July 2, 1973), jurisdiction was found to exist pursuant to 8 U.S.C. §1329. I follow the holding in that case on this point and find that jurisdiction is properly asserted. And see *Buckley v. Gibney,* 332 F. Supp. 790 (S.D.N.Y.), *aff'd,* 449 F.2d 1305 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972).

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1. In addition to the two actions now before this court, 127 other separate, but similar, actions have been filed seeking a stay of deportation. Counsel for all the plaintiffs and the Government have agreed to submit only two actions, chosen as factually and legally representative of the claims of all plaintiffs, for decision. Counsel have further stipulated to be bound in each of these other actions by the court's decision in these two cases. A complete list of the other actions involved is attached as an appendix.

Opinion of the United States District Court

I

Factual Background[2]

Chim Ming:

Chim Ming was born in China in 1919 and maintained continuous residence there until 1955. He then migrated to Hong Kong, was issued appropriate papers, became a seaman and was so employed from 1955 to 1967. Plaintiff's wife and three of his children remain in China and a fourth child lives in Hong Kong. In April 1967, after deserting his ship in Newark, New Jersey, he was permitted to enter this country as a non-immigrant crewman authorized to remain for a period of twenty-nine days. Section 252 of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. §1282.

The plaintiff did not depart this country at the end of the authorized 29-day stay. He was apprehended on January 26, 1968, and deportation proceedings were begun. At the hearing plaintiff conceded deportability and by order of the Special Inquiring Officer, dated February 9, 1968, he was ordered deported. After being released on bond Chim Ming failed to surrender for deportation and was not again apprehended until 1972. Provisions were made for his deportation on December 1, 1972, but on November 24, 1972, plaintiff submitted a request

2. The statement of facts, which is drawn from the Government's affidavit in opposition to a motion for a preliminary injunction has been conceded by plaintiff's attorneys to be accurate.

for political asylum. A hearing on this application was held and pursuant to then current procedures, the Department of State was asked for an advisory opinion. The Department concluded that since plaintiff had not demonstrated that he was a political refugee, his deportation was appropriate.

The plaintiff was notified on January 16, 1973, that his request for asylum had been denied but that he could request a temporary stay of deportation pursuant to §243(h) of the Act, 8 U.S.C. §1253(h), if he could establish that he would be subject to persecution in Hong Kong. Plaintiff concedes he is not entitled to relief under this section and has instituted this action to prevent deportation under the provisions of the Protocol and the Convention. The court has issued a temporary restraining order with the Government's consent, enjoining deportation until these issues are resolved.

Lam Yim Yim:

Lam Yim Yim was born in China in 1933 and lived there until 1961 when he entered Hong Kong. His wife, parents and five children remain in China. The plaintiff was permitted to enter this country as a non-immigrant crewman while his ship was in port for a period not to exceed 29 days. Section 252 of the Act, 8 U.S.C. §1282. The plaintiff, after entry, deserted his ship and remained in this country beyond the authorized period.

Lam Yim Yim was apprehended on September 21, 1972 in New York City and deportation proceedings were begun, culminating in a hearing on October 3, 1972 at which plaintiff

conceded deportability. The Special Inquiring Officer found him deportable and granted his request of voluntary departure no later than November 15, 1972. The plaintiff did not leave this country as required and on March 16, 1973 a warrant of deportation was issued against him.

On March 27, 1973 Lam Yim Yim submitted a request for political asylum and a hearing was held on that application on April 2, 1973. Unlike the case of Chim Ming, the Immigration and Naturalization Service, without consultation with the Department of State, concluded that the plaintiff was not a political refugee.[3] On April 9, 1973 Lam Yim Yim was notified of this decision and advised of his right to seek further relief pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h), as a person subject to persecution in Hong Kong. Plaintiff, conceding the inapplicability of that statute to his case, initiated this action seeking relief pursuant to the Protocol and the Convention. The court has temporarily restrained deportation, with the Government's consent, pending determination of the issues raised here.

3. This change in procedure, effectuated between the time of Chim Ming's refugee hearing and Lam Yim Yim's hearing, is concededly the only significant distinction between these two cases. The plaintiffs each raise the identical claims under the Protocol and the Convention, but in addition, Lam Yim Yim attacks the propriety of these revised procedures. This distinct aspect of his case will be discussed separately after joint issues are disposed of.

Opinion of the United States District Court

II

The Protocol and The Convention

On October 4, 1968, the United States Senate approved, effective November 1, 1968, the United Nations Protocol Relating to the Status of Refugees. 19 U.S.T. 6257. The Protocol provides in Article 1 that except for certain technical alterations:

> "1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention [relating to the Status of Refugees] to refugees as hereinafter defined."

The Convention (as modified by the Protocol) defines a "refugee", in Article 1, A(2), as any person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 32 of the Convention, made applicable to the United States through the Protocol, provides in pertinent part:

Opinion of the United States District Court

Expulsion

> "1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

The parties have narrowed the issues to 1) whether the plaintiffs are in fact refugees within the meaning of the Convention and 2) whether, if they are refugees, they are entitled to protection under Article 32 of the Convention. For the purposes of this opinion it will be assumed that plaintiffs are refugees. On that assumption, we proceed to a determination of the second question.

By its own records, Article 32 prohibits the contracting States from expelling refugees "lawfully in their territory" except for national security reasons. No national security issues have been raised by the Government, and we are required only to define the phrase "lawfully in their territory".

The plaintiffs ask the court to disregard the accepted and common definitional usage of the term "lawfully". They argue that unless this approach is adopted the treaty would be "a nullity" since most refugees are, because of their desperate situations, in the country illegally. The plaintiffs offer no historical or legislative support, or legal precedent for their position.

The Government, on the other hand, argues that the word "lawfully" is critical to a proper interpretation of Article 32 and

that its meaning is clear and unequivocal; and thus that in the context of this lawsuit, the court must look to the immigration laws of this country to determine the lawfulness of an alien's presence. The Government's position is supported by the treaty's history, its legislative history in the Senate, court rulings, and the clear meaning of the words in question.

The Treaty:

The United Nations Ad Hoc Committee on Statelessness and Related Problems which drafted Article 32 has stated:

> "The expression 'lawfully within their territory' throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission." Report, U.N.E.C.O.S.O.C. at 47, U.N. Doc. E/1618/Corr. 1/E/AC.32/5/Corr. 1 (March 2, 1950).

The Committee later elaborated on its thinking:

> "The Committee decided that it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase 'lawfully in the territory', the Committee expressed the view that, in any event, a Contracting State may consider

that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn." Report, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850/E/AC.32/8 (August 25, 1950).

Furthermore, in a letter to counsel in a similar action, the Deputy Representative of the United Nations High Commissioner for Refugees, quoting directly from instructions received from his Geneva headquarters, states, in part:

> "In determining whether a refugee is 'lawfully in the territory' of a Contracting State, regard must be had to all the circumstances of his presence there, and in this respect the manner in which he originally entered the territory, i.e. lawfully or unlawfully, is not the only decisive factor.
>
> "Art. 31 of the 1951 Convention recognizes the possibility that the status of a refugee who has entered illegally the territory of a Contracting State may subsequently be regularized. Conversely, the stay of a refugee who has entered in a regular manner, may subsequently become unlawful. This would for example be the case if the authorities of the country are not prepared to grant him residence beyond the *limited period* for which he was admitted or if they withdraw his residence permission on the ground that he has

not complied with the *conditions* under which he was admitted, e.g. to pursue his studies. As long as his stay is 'lawful,' even though admitted temporarily, he can only be expelled on grounds of 'national security and public order.' If, however, his stay ceases to be 'lawful' in the circumstances described above, he is no longer 'lawfully in the territory of the Contracting State' and may therefore not invoke the special protection of Art. 32 of the 1951 Convention." Affidavit of Joseph Marro in Opposition to a Motion for a Preliminary injunction, sworn to on April 19, 1973 at Exhibit A. (Emphasis in original.)

History of United States Action on the Protocol:

The history of the adoption of the Protocol by this country makes clear that all the individuals and institutions involved in that process had a continuing belief that the Convention would not alter or enlarge the effect of existing immigration laws, chiefly because it was felt that our immigration laws already embodied the principles of the Convention. Thus, in transmitting the Protocol to the President, the Secretary of State noted that "United States accession to the Protocol would not impinge adversely upon the laws of this country." S. Exec. K. 90th Cong., 2d Sess. at VII. President Johnson, in forwarding the Protocol to the Senate for approval, stated:

> "It is decidely in the interest of the United States to promote this United Nations effort to

broaden the extension of asylum and status for those feeling persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere. This impetus would be enhanced by the fact that most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries." S. Exec. K, 90th Cong., 2d Sess. at III.

In the Senate the State Department submitted the statement of Mr. Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, which points out that

> ". . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to

any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act.

* * *

"[The President] has pointed out that since refugees in this country already enjoy the protection and rights which the Protocol seeks to secure everywhere, United States accession should help to advance the Protocol and acceptance of its humane standards in other states whose treatement of refugees is less liberal . . . . Even though the United States already meets the standards of the Protocol, formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees and more generous practices on the part of countries whose approach to refugees is less liberal than our own." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 6-7

The following exchange at the Committee hearings also provides some insight as to the Senate's understanding of the Protocol:

"SENATOR SPARKMAN. Is there anything in here that conflicts with our existing immigration laws?

MR. DAWSON. I would answer that briefly and then ask Mrs. McDowell [of the Treaty Section, Office of the Legal Adviser, Department of State] to give a more authoritative answer. I would say that Article 32 which prohibits the expulsion of a refugee who is lawfully in this country to any country except on grounds of national security or public order would pose certain questions in connection with section 241 of our Immigration and Nationality Act, which states the deportation provisions. But I do not believe it would be in conflict. We believe most of those grounds in 241 are grounds which can be properly construed as having the basis of national security or public order, and we also are assured that those relatively limited cases which perhaps could not be so construed could be dealt with by the Attorney General without the enactment of any further legislation . . . .

MRS. McDOWELL. I think Mr. Dawson has covered it well. We are assured by the Justice Department that this is their view. That the existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of

this convention which are not presently contained in the Immigration and Nationality Act.

For example, section 241 of the Act allows the Attorney General to deport an alien for certain stated reasons. Most of these are criminal conduct of various kinds or subversive activities.

"There are two categories, only two, that we think are not covered, and these are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. These two areas would not be enforced against refugees if the protocol were in force." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 8.

Prior Decisions:

It appears that in only two other cases have the issues here raised been considered. *Kan Kam Lin v. Rinaldi,* Civ. Action No. 1823-72 (D.N.J. July 2, 1973); and *In re Dunar,* Board of Immigration Appeals, Interim Decision File No. A14 616, 395 (San Francisco April 17, 1973). In both cases the history discussed above was reviewed and it was decided that an alien who overstayed the legal limits of his admission into this country was no longer "lawfully" here and therefore could not claim the benefits of the Convention.

Determination:

The plaintiffs were legally admitted to this country pursuant to 8 U.S.C. §1282 which permits an immigration officer "in his discretion . . . [to] grant the [alien] crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General . . . and for a period of time, in any event, not to exceed" twenty-nine days. Each plaintiff improperly remained longer than the maximum permissible time and after appropriate hearings was found to be unlawfully in this country and deportable.

The immigration laws make certain provisions for achievement of lawful status by those here unlawfully, see *e.g.*, §§244(a), 245 and 249 of the Act, 8 U.S.C. §§1254(a), 1255, 1259. As was suggested in *In re Dunar, supra*, at 9:

> "If we accepted respondent's view, all these, as well as the deportation provisions of section 241(a), would be rendered nugatory in the case of an alien refugee who entered lawfully as a nonimmigrant and remained unlawfully. If such an alien achieves nondeportability under Article 32 of the Convention, he becomes in effect a permanent resident. There is nothing in the legislative history of this provision to indicate that the Senate had any notion that this result would follow accession. Indeed, there is every indication that those who framed Article 32 on behalf of the United Nations never intended to saddle a host country with any such limitation."

Plaintiffs suggest that the strict interpretation of the "lawfully" renders the Convention without meaning since refugees are often in the country unlawfully. The simple answer here is that the Contracting States did not intend to protect refugees who unlawfully entered the country. Moreover, the cases now before me do not raise the more sympathetic claim of a refugee, forced to leave his own country covertly, who entered here illegally. The plaintiffs in these cases each enjoyed a period of legal status in this country and could have made their claims under the provisions of the Convention during that time — they did not do so.

The plaintiffs also suggest that new regulations governing the issuance of travel documents justify decision in their favor. 38 Fed. Reg. 8238 (1973) sets forth these amendments to 8 C.F.R. Plaintiffs point specifically to Part 223a, Refugee Travel Document, §223a.3, Eligibility, which provides:

> "Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require; sympathetic consideration shall be given to such an application unless the Service intends

to expel or exclude the alien from the United States . . . ."

Plaintiffs contend that "[f]rom this regulation it appears obvious that all refugees in the United States may obtain a travel document which would permit such refugees to reenter the United States." Plaintiffs' Memorandum of Law, at 18. They conclude that if a refugee can leave and return he ought to be allowed to remain without leaving.

The fallacy, however, is that it is not "obvious" at all that "all refugees" may get travel documents. Indeed, the regulation, in language quite similar to the Convention, provides that the travel document shall issue only if the presence of the refugee in this country is "lawful". The fact that this country may, in its discretion, issue documents to refugees here unlawfully, is not only in conformance with Article 28 of the Convention, but is of no help to the plaintiffs, since the Convention indicates that the purpose of this discretionary power was to permit travel by those who cannot be deported because they will not be accepted elsewhere.

The overwhelming and indeed uncontroverted evidence of the meaning of the Convention as revealed in all stages of its creation, adoption and interpretation lead me to conclude that plaintiffs' unlawful presence in this country precludes their invocation of rights under Article 32.

Plaintiffs' only remaining claim in this regard is that insofar as their claim under the Protocol is concerned, they never

received a hearing on the lawfulness of their presence. Of course, in all cases either the Department of State or the Immigration and Naturalization Service, after a hearing made a determination that the aliens were not refugees but did not *at that time* consider the legal status of the plaintiffs. Since I have assumed, for the purposes of this decision, that the plaintiffs were refugees these hearings are not relevant. That is not to say, however, that the plaintiffs have not had the opportunity to contest a finding of unlawful status.

In each case the alien was originally afforded a deportation hearing, the precise purpose of which was to determine the status of their presence here. In both cases the plaintiffs admitted the unlawfulness of their status here, but even had they not done so (I doubt all the plaintiffs in all the related cases did so) those deportation hearings, followed by appropriate administrative and judicial appeals, were proper and adequate for a determination of the lawfulness question. The findings there made cannot now be attacked collaterally in this action, nor may plaintiffs claim they were not afforded the full panopoly of due process rights in regard to the determination of their unlawful presence here. *Kan Kam Lin v. Rinaldi, supra.*

State Department Review:

When the Immigration and Naturalization Service receives a request for asylum as a political refugee it conducts a hearing to determine the facts of the case. Prior to January 1973, the Service would then send a brief statement of facts to the State Department for an opinion as to propriety of considering the

alien a political refugee. If such status was denied to the alien he would be so advised by the Service.

By a letter of January 22, 1973 from Mr. Raymond W. Tangel, Director, Office of Refugee and Migration Affairs, Department of State, to Mr. James Greene, Associate Commissioner for Operations, Immigration and Naturalization Service, the procedure for the review of refugee status requests was changed. That letter provides in pertinent part:

> ". . . We recognize the problems raised by last-minute requests for asylum from aliens who could have applied earlier for a hearing under Section 243(h) of the Immigration and Nationality Act.
>
> "In your letter you refer to the specific problem of citizens of the Peoples' Republic of China who fled to Hong Kong and have resided there for a substantial period of time. There is no likelihood that these aliens will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong nor have we any specific reason to believe that any of such persons will be returned by that government to countries where they will face such persecution. Our policy is to deny such requests for asylum provided: (a) they are deported to Hong Kong and not the Peoples' Republic of China and (b) that the Colony will accept them.

> "We agree that such last minute requests concerning the return of Chinese to Hong Kong as described above can be handled by the Immigration and Naturalization Service without consultation with the Department through our office. We understand from your letter that during the deportation hearings all such aliens will have available to them the various benefits of the Immigration and Nationality Act, including withholding of deportation under Section 243(h) and the application of the Convention on Refugees whenever appropriate in their cases . . . ."

The plaintiff Lam Yim Yim objects to this new procedure claiming not that it in any way violates his rights directly, but rather that it is indicative of summary disposition of these cases, rather than the individual consideration to which each is entitled.

Inasmuch as this decision has assumed *arguendo* that all plaintiffs were refugees it is not necessary to decide whether the administrative determination that plaintiff was not a refugee was properly arrived at. It should be noted, however, that while due process certainly requires that an alien receive full opportunity to present his claims, there is nothing in either the Convention or laws of this country which dictates that the State Department must be the final arbiter of all claims for refugee status. Thus, the mere fact that the Service, rather than the State Department, reviews an alien's claims would not appear to be objectionable in

itself. In any event, this is not the proper case to review the applicable procedures because this decision rests solely on the unlawfulness of plaintiffs' presence and as to that issue they have had protection of adequate due process safeguards.

The plaintiffs' motion for a preliminary injunction is denied and the temporary restraining order heretofore entered is vacated. The defendants' motion for summary judgment is granted.

SO ORDERED.

Dated: New York, New York
November , 1973

s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

LETTER OF JANUARY 16, 1973 FROM SOL MARKS TO CHIM MING

January 16, 1973

A16 026 481 DB/JH

CHIM MING
305 Broome Street Apt. 11
New York, New York

Dear Sir:

Reference is made to your request for political asylum filed on November 27, 1972.

In Consultation with the Department of State, this Service has determined that there is no basis for granting your request for political asylum.

This finding does not preclude you from filing a motion to reopen deportation proceedings for the purpose of introducing an application to withhold deportation under Section 243 (h), if you so desire.

Very truly yours,

s/ Sol Marks

Sol Marks
District Director
New York, District

CC: Jules Coven, Esq.
1 East 42nd Street
New York, New York

LETTER OF APRIL 9, 1973 FROM SOL MARKS TO LAM YIM YIM

20 West Broadway
New York, New York 10007

A15 664 513 DB/TB

April 9, 1973

LAM YIM YIM
190 E. 2nd Ave. Apt. 15
New York, New York

Dear Sir:

Reference is made to your request for political asylum submitted on March 29, 1973 and elaborated in an interview at this office on April 2, 1973. On the basis of the information presented, it is the opinion of this Service that you would not be subject to persecution on account of your race, religion, nationality, membership of a particular social group or political opinion if you return to Hong Kong. Therefore, your application for political asylum is denied.

You are in the United States unlawfully because you were permitted to land temporarily and solely in pursuit of your calling as a crewman and have remained longer than authorized. At a deportation hearing held on October 3, 1972 your deportablility was established but you were granted the privilege of voluntary departure on or before November 15, 1972. Since

Letter of April 9, 1973

you failed to depart from the United States an outstanding warrant of deportation was issued. Your deportation was stayed pending decision on your request for political asylum which has since been denied.

If you desire to further pursue your request for asylum, you may file a motion to reopen deportation proceedings for the purpose of introducing an application to withhold deportation under Section 243(h) of the Immigration and Nationality Act. However, the filing of such a motion will not stay your deportation.

Very truly yours,

s/ Sol Marks

Sol Marks
District Director
New York District

CC: Jules Coven, Esq.
1 E. 42 St.
New York, N.Y. 10017

In the Supreme Court of the United States

OCTOBER TERM, 1974

CHIM MING AND LAM YIM YIM, PETITIONERS

v.

SOL MARKS, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The question presented is whether Chinese alien seamen with Hong Kong documents, who are in this country illegally, are entitled to relief from deportation under the United Nations Protocol Relating to the Status of Refugees.

Petitioners are natives of the Republic of China. Subsequent to the ouster of the Nationalist government from mainland China, they migrated to Hong Kong. They obtained papers there for employment as seamen and were so employed until entry into the United States.

Petitioners entered this country as nonimmigrant crewmen, with authorization under Section 252 of the Immigration and Nationality Act, 66 Stat. 220, to remain for a period not to exceed 29 days. 8 U.S.C. 1282. They failed to depart within the authorized period, however, and deportation proceedings commenced after they were

apprehended by officers of the Immigration and Naturalization Service. Following a hearing at which each petitioner conceded the factual allegations of the deportation charge, they were found to be deportable to Hong Kong. Neither of the petitioners appealed this finding (Pet. App. 2a-3a).

Following the deportation orders and pursuant to the United Nations Protocol Relating to the Status of Refugees ("Protocol"),[1] petitioners filed applications for political asylum as refugees. The District Director of the Immigration and Naturalization Service denied each of the requests (Pet. App. 27a-29a).[2]

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[1]The effect of the Protocol was to make Articles 2 through 34 of the 1951 Geneva Convention Relating to the Status of Refugees ("Convention") applicable to the United States. The Protocol, 19 U.S.T. 6224, 6257, was advised by the Senate on October 4, 1967, approved by the President on October 15, 1968, and became effective on November 1, 1968.

[2]Petitioner Chim Ming was born in mainland China in 1919 and resided in that country until he entered Hong Kong in 1955. He was admitted to this country as a nonimmigrant crewman in April 1967. He did not depart within the period authorized and was apprehended by officers of the Immigration Service in January 1968. Petitioner Ming was found deportable on February 9, 1968, and released on bond. He failed to surrender for deportation and was not reapprehended until late 1972. On November 24, 1972, petitioner submitted his application for political asylum to the Service. He was interviewed by an officer of the Immigration Service on December 1, 1972, and in accordance with procedures then in effect, the information was forwarded to the Department of State for an advisory opinion. On December 20, 1972, the Department of State responded that petitioner Ming had failed to establish that he was a political refugee and that deportation to Hong Kong would be appropriate. On January 16, 1973, petitioner was notified that his request was denied (Pet. App. 27a).

Petitioner Lam Yim Yim resided in mainland China from his birth in 1933 until 1961 when he entered Hong Kong. He was

Petitioners thereafter brought suit in the United States District Court for the Southern District of New York seeking an injunction to restrain their deportations.[3] The district court denied petitioners' request for an injunction and granted summary judgment in favor of respondents (Pet. App. 6a-26a). The court held that—even assuming that petitioners are "refugees"—they were not "lawfully in [the] territory" as required by the express language of Article 32(1) of the Convention, the Convention's history and the legislative history of the Protocol in the Senate. The court therefore concluded that petitioners were not entitled to the benefits of the Protocol. The court of appeals affirmed *per curiam* (Pet. App. 1a-5a).

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admitted to this country on May 19, 1972, as a nonimmigrant crewman but did not depart within the period authorized. He was apprehended by officers of the Immigration Service on September 21, 1972. A deportation hearing was held on October 3, 1972, at which petitioner Lam Yim Yim, represented by counsel, conceded deportability. He was found to be deportable and granted the privilege of voluntary departure. Again, however, he did not depart within the specified period and a warrant of deportation was issued against him on March 16, 1973. On March 27, 1973, petitioner submitted a request for political asylum. Following a hearing, his request was denied (Pet. App. 28a-29a).

[3]As noted by the district court (Pet. App. 7a, n. 1), 127 additional, but similar, suits have been filed in the Southern District of New York seeking stays of outstanding deportation orders. Counsel for the plaintiffs in those suits have agreed that petitioners' claims are representative of the claims of all of the plaintiffs and have agreed to be bound by the decisions rendered in the cases involving petitioners.

Petitioners' claim here is essentially that under the terms of the Protocol they are "refugees" and that, accordingly, they may not be expelled except on grounds of national security or public order. This contention was also made, and rejected, in *Kan Kam Lin* v. *Rinaldi*, 493 F.2d 1229 (C.A. 3), certiorari denied, October 15, 1974, No. 73-1710, and is fully discussed in our Brief in Opposition in that case.[4]

Article 32 of the Convention, and the corresponding provision of the Protocol (see n. 1, *supra*), provide in relevant part:

> The Contracting States shall not expel *a refugee lawfully in their territory* save on grounds of national security or public order. [Emphasis added.][5]

Petitioners' claim is thus refuted by the express terms of the Convention and Protocol. As the courts below found, the history of the Convention and the course of the Senate's deliberations with respect to the Protocol provide conclusive support for the conclusion that a refugee must be in the United States in conformity with our immigration laws to be entitled to invoke the provisions of the Protocol. See Robinson, *Convention Relating to the Status of Refugees—Its History, Contents and Interpretation*, pp. 156-157 (1953); *Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 47, U.N. Doc. E/1618/Corr. 1; E/AC. 32/5/Corr. 1 M (March 2, 1950); *Ad Hoc Committee on Statelessness and Related*

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[4]We are serving upon petitioners' counsel a copy of the Brief in Opposition filed by the government in *Kan Kam Lin*.

[5]Article 1(A)(2) defines a "refugee" as any person who

> * * * owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Problems, Report, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850; E/AC. 32/8 (August 25, 1950); Appendix, 90th Cong., 2d Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968, at 6.

In summary, the courts below properly held that the status accorded refugees must be viewed in the context of the legality of their presence under the immigration laws of the United States. Since petitioners admittedly are in this country illegally, the benefits of the Protocol are not available to them.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.